Introduction

*James Toomey**

Adolf Reinach (1883–1917) was a philosopher. Before his battlefield death at the age of thirty-three, his philosophical career was brief; the corpus he left slim.[1] Today, he is best known for developing a theory of social acts thought to be an independent precursor to the speech act theories of John Austin and others later in the century.[2] He is cited in certain branches of philosophy for his contributions on speech act theory and other contributions to metaphysics, including the mode of existence of states-of-affairs, their relationship to other features of our world, and the role of 'phenomenology' in epistemology.[3] In short, Reinach is taken today as a rather obscure metaphysician with a limited body of work.

But Reinach was also a *legal* philosopher. He wrote and thought a great deal about the law and legal philosophy,[4] and, uniquely in the philosophical circles in which he moved, he had trained as a lawyer.[5] Indeed, just as Austin would later draw

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1 Adolf Reinach, *Gesammelte Schriften* (M Niemayer 1951); Karl Schuhmann and Barry Smith, 'Adolf Reinach: An Intellectual Biography', in Kevin Mulligan (ed), *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Nijhoff 1987) 25.

2 John F Crosby, 'Adolf Reinach's Discovery of the Social Acts' (1983) 3 Aletheia 143; Kevin Mulligan (ed), *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Nijhoff 1987).

3 Jan Woleński, 'Adolf Reinach, Negative States of Affairs and the Concept of Omission' (2020) 90 Folia Iuridica 5; Barry Smith, 'On the Cognition of States of Affairs', in Kevin Mulligan (ed), *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Nijhoff 1987) 189; Kimberly Baltzer-Jaray, 'Bogged Down in Ontologism and Realism. Reinach's Phenomenological Realist Response to Husserl', in Rodney KB Parker (ed), *The Idealism-Realism Debate Among Edmund Husserl's Early Followers and Critics* (Springer 2021); Denis Seron, 'Adolf Reinach's Philosophy of Logic', in Bruno Leclercq, Sebastien Richard, and Denis Seron (eds), *Objects and Pseudo-Objects: Ontological Deserts and Jungles from Brentano to Carnap* (De Gruyter 2015).

4 ibid.

5 Baltzer-Jaray (Chapter 4, this volume).

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on legal examples in his own discussion of speech acts,[6] Reinach's social act theory is presented in, but takes up only a portion of, the most substantial publication of his life – the 1913 monograph *The A Priori Foundations of the Civil Law*.[7] The *Foundations* is a substantial work of legal philosophy that theorizes about basic constituents of private law – promise, obligation, claim, right, property, representation, and more – as social acts.[8]

In the century since his death, Reinach's substantive legal philosophy – that is, the *rest* of the *Foundations* – has fallen by the wayside.[9] Until recently, you could search in vain for citations to Reinach in the law reviews. While Reinach's contributions to philosophy have undergone a renaissance in certain branches of ontology in the past forty years, his *legal* philosophy has not been the focus.[10] And even as private law theory has turned greater attention to Kant and other moral philosophers in recent decades,[11] if you wanted to discuss Reinach at an English-speaking conference on jurisprudence, you would at best be looked at with befuddlement.

Granted, given what Reinach argued about the law, his dismissal from the Anglophone jurisprudential canon makes some sense. As the title of his monograph suggests (the *A Priori Foundations*), Reinach argued that the basic legal concepts that structure private law are metaphysically real constituents of the universe, accessible *a priori* by something called the 'phenomenological method' – '[w]e shall show that the structures which one has generally called specifically legal have a being of their own just as much as numbers, trees, or houses, that this being is

[6] JL Austin, *How to Do Things with Words* (JO Urmson and Marina Sbisà, eds, 2d edn Harvard University Press 1975); 57.

[7] Hereinafter *The Foundations* or *Foundations*. Citations throughout the volume are to John F Crosby's most recent English translation, except where otherwise noted by individual authors. Adolf Reinach, 'The Apriori Foundations of the Civil Law' (John F Crosby tr, 1983) 3 Aletheia 1, reprinted in Adolf Reinach, *The Apriori Foundations of the Civil Law Along with the Lecture 'Concerning Phenomenology'* (John F Crosby ed, Ontos Verlag 2012), originally published as Adolf Reinach, 'Die apriorischen Grundlagen des bürgerlichen Rechtes', 1(2) *Jahrbuch für Philosophie und phänomenologische Forschung* (Max Niemeyer 1913) 685–847.

[8] ibid.

[9] Of course, not entirely. Neil Duxbury, 'The Legal Philosophy of Adolf Reinach' (1991) 77 Archives for Philosophy of Law and Social Philosophy 314; Stanley L Paulsen, 'Demystyifying Reinach's Legal Theory', in Kevin Mulligan (ed), *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Kluwer 1987). And indeed, while engagement with Reinach's work has become rare in English-language legal philosophy, it has been the subject of a small but consistent literature in German. Sophie Loidolt, *Einführung in die Rechtsphänomenologie* (Mohr Siebeck 2010); Christoph J Lüttenberg, 'Über das Sein des Sollens – Die rechtlichen Gebilde in der Rechtsphänomenologie Adolf Reinachs' (2020) 11 Zeitschrift für rechtswissenschaftliche Forschung 9; Kai Purnhagen, 'Grundlagen der Rechtsphänomenologie – Eine kritische Darstellung der Rechtsphänomenologie von Adolf Reinach und Wilhelm Schapp zu den apriorischen Grundlagen des Privatrechts' (2009) 31 JURA – Juristische Ausbildung 661.

[10] Barry Smith, 'Adolf Reinach: An Annotated Bibliography', in Kevin Mulligan (ed), *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Nijhoff 1987); Jeff Mitscherling, Tanya DiTommaso, and Aref Nayad, *The Author's Intention* (Lexington 2004) 5.

[11] Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 1995); Arthur Ripstein, 'Private Order and Public Justice: Kant and Rawls' (2006) 92 Virginia L Rev 1391.

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independent of its being grasped by men, that it is in particular independent of all positive law.'[12] '[T]he positive law', Reinach boldly proclaims, '*finds* the legal concepts which enter into it; *in absolutely no way does it produce them*.'[13]

In the century since Reinach wrote, there is perhaps no proposition of legal theory more widely taken for granted than that, whatever legal concepts are, they are not what Adolf Reinach thought.[14] Most famously and enduringly associated with the contributions of American Legal Realism, various forms of nominalism about legal concepts – that, say, the legal concepts of 'contract' and 'ownership' are more or less arbitrary exercises in policymaking, often *sub silentio* – have been gospel in the legal academy for over a hundred years.[15] As the slogan has it, 'we are all legal realists now'.[16] In analytical jurisprudence, neither HLA Hart nor Ronald Dworkin thought legal concepts have a determinate metaphysical existence.[17] And whatever the Law and Economics and Critical Legal Studies movements disagree about, it isn't this.[18]

But perhaps now is the time to start engaging with Reinach – and his provocative metaphysical realism about legal concepts, sharp analysis of those concepts, and epistemic confidence in 'phenomenological' discernment – once again in legal philosophy. In the past few decades, theorists, particularly of the 'New Private Law' school, have grown increasingly skeptical of the hegemonic picture of private law concepts as exercises in boundless policy invention and reinvention.[19] Many of these scholars again take seriously private law's internal point of view, sometimes including that perspective's notorious solicitude for conceptual reasoning, while acknowledging a variety of interdisciplinary, external perspectives.[20] And indeed, in the past few years, legal theorists have begun to engage with Reinach's work in private law theory and adjacent areas of philosophy.[21]

[12] Reinach (n 7) 4.
[13] ibid.
[14] Frederick Schauer, 'The Limited Domain of the Law' (2004) 90 Virginia L Rev 1909.
[15] Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co. 1960) 180–81; Felix S Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia L Rev 809; Scott Brewer, 'On the Possibility of Necessity in Legal Argument: A Dilemma for Holmes and Dewey' (2000) 34 John Marshall L Rev 9, 39.
[16] Joseph William Singer, 'Legal Realism Now' (1988) 76 California Law Review 465, 467.
[17] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 83; HLA Hart, *The Concept of Law* (3rd ed Oxford University Press 2012) 129–29; Jules L Coleman, 'Truth and Objectivity in Law' (1995) 1 Legal Theory 33, 47.
[18] Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard L Rev 1089; Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harvard L Rev 168; Gary Peller, 'The Metaphysics of American Law' (1985) 73 California L Rev 1151.
[19] Andrew S Gold, John CP Goldberg, Daniel B Kelly, Emily Sherwin, and Henry E Smith (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press 2020).
[20] ibid.
[21] James Toomey, 'Property's Boundaries' (2023) 109 Virginia L Rev 131; Olivier Massin, 'The Metaphysics of Ownership: A Reinachian Account' (2017) 27 Axiomathes 577; Manuela Massa, 'Property and *Nuda Potestas* as Constitutions of Reinach's Philosophy of Law' (2020) 90 Folia Iuridica 75.

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In this context, Reinach's account of the *a priori* foundations of civil law offers valuable insights – perhaps *uniquely* valuable insights – to both proponents and detractors of a conceptualist, formalist turn in private law theory. For one thing, unlike many earlier proponents of legal formalism and natural law theory, Reinach *knew* he was defending a contrarian view against rising (and ultimately ubiquitous) positivist nominalism.[22] He framed his thesis against a view 'on which there is general agreement', that 'all legal propositions are *creations* of the lawmaking factors'.[23] And by taking seriously and engaging with nominalism on its own terms, his arguments might merit more credence than earlier theorists who assumed worldviews no longer widely accepted – say what you will about Reinach, he is no easily dismissed pre-Darwinian natural law theorist building jurisprudence on partisan theology. Indeed, he is no traditional natural law theorist at all, because although he took core legal concepts like promise to be metaphysically real, he also believed them normatively inert, and the positive law free to deviate from their *a priori* entailments in the name of morality or expedience.[24]

Moreover, Reinach's enthusiastic embrace of *metaphysical* realism in private law can help both illuminate and challenge debates around legal concepts today. For those sympathetic to a role for conceptual reasoning or analysis in legal discourse, Reinach might offer a theory of legal concepts' nature – supported by his broader 'Realist Phenomenology' theory of the universe, a general account of metaphysics and epistemology that has been revisited in philosophy in the past few decades.[25] Or, as several contributions in this volume suggest in different ways, it might be that his *analysis* of legal concepts is illuminating even if his particular *theory* of their existence is not – he may have done valuable work making sense of the entailments of legal concepts that exist in some other, less difficult, way.[26]

At the same time, to skeptics of law's internal point of view, or of the determinacy of legal concepts, Reinach might be saying the quiet part of any sort of legal conceptualism out loud. Nominalists about legal concepts have long suspected their opponents of (at least) closet Platonism – of being committed to law as a 'brooding omnipresence in the sky',[27] consisting of a 'heaven for legal concepts',[28] notwithstanding the interdisciplinary efforts of New Private Law theorists to avoid these sorts

[22] Reinach (n 7), 4.
[23] ibid.
[24] ibid 45.
[25] Barry Smith, 'Realistic Phenomenology', in Lester Embree (ed), *Encyclopedia of Phenomenology* (Springer 1997) 586; Baltzer-Jaray, 'Bogged Down' (n 3) 156.
[26] Andrew S Gold and Henry E Smith (Chapter 5, this volume); Marietta Auer (Chapter 1, this volume); James Toomey (Chapter 2, this volume); Paul B Miller (Chapter 7, this volume); Lorenz Kaehler (Chapter 3, this volume); Sandy Steel (Chapter 6, this volume).
[27] *S Pac Co v Jensen* [1917] 244 U.S. 205, 222 (Holmes, J., dissenting).
[28] Rudolf von Jhering, 'In the Heaven for Legal Concepts: A Fantasy' (Charlotte L Levy, tr, 1985) 58 Temple L Q 799.

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of commitments.[29] From that perspective, at least Reinach *doesn't* shy away from bold work in metaphysics, but rather embraces it wholeheartedly – perhaps raising the possibility that, at bottom, and in one of its best articulations, maybe conceptual analysis in legal reasoning *does* demand faith in something like the World of Legal Forms.[30]

In this volume, we bring together papers by American and European legal theorists and philosophers on Reinach's work and its implications for private law. In so doing, we aspire to both resuscitate and interrogate Reinach's legal theory, to situate Reinach's theories alongside their alternatives and make sense of their relationship to debates in contemporary private law scholarship. Moreover, we hope that this volume will serve as a resource for private law scholars hoping to learn more about Reinach, philosophers and scholars of Reinach who plan to engage more with the legal aspects of his work, and students coming upon Reinach for the first time.

The contributions are arranged in three parts. In the first, Marietta Auer, James Toomey, Lorenz Kaehler, and Kimberly Baltzer-Jaray write about issues related to Reinach's philosophical methodology. In Part II, Andrew Gold and Henry Smith, Sandy Steel, Paul Miller, and Olivier Massin discuss connections between Reinach's legal philosophy and contemporary private law theories. And finally, Stephan Kirste, Emma Tieffenbach, Alessandro Salice and Olivier Massin, and Crescente Molina draw on Reinach's approach in making novel arguments about *particular* legal concepts – from the concept of legal time to that of agreement.

This introduction is similarly arranged. After setting the scene with a brief biography of Adolf Reinach, we introduce each of the three parts, and summarize the chapters, in turn.

I.1 A BRIEF LIFE OF ADOLF REINACH

Adolf Bernhard Philipp Reinach was born in 1883 to a prominent and well-established Jewish family in Mainz, near Frankfurt, then of the German Empire.[31] His interest in philosophy began in his teenage years at *Ostergymnasium* at Mainz,

[29] Paul B Miller, 'The New Formalism in Private Law' (2021) 66 American Journal of Jurisprudence 175; Henry E Smith, 'On the Economy of Concepts in Property' (2012) 160 University of Pennsylvania L Rev 2097; John Gardner, *From Personal Life to Private Law* (Oxford University Press 2018) 11–12; Jules L Coleman, 'The Practice of Corrective Justice' (1995) 37 Arizona L Rev 15, 22.

[30] Granted, it is controversial whether Reinach's account is properly described as 'Platonist'. Kimberly Baltzer-Jaray, 'Adolf Reinach Is Not a Platonist' (2009) 13 Symposium: Canadian J Continental Philosophy 100; Smith, 'Cognition of States of Affairs' (n 3) 201. As far as legal philosophers go, however, he was clearly *something like* a Platonist.

[31] John F Crosby, 'A Brief Biography of Adolf Reinach', in John Crosby (ed), *The Aprior Foundations of the Civil Law: Along with the Lecture 'Concerning Phenomenology'* (Ontos Verlag 2012).

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where he was introduced to Plato, who would remain one of his most significant influences throughout his life.[32]

In 1901, Reinach started at the University of Munich, where he studied philosophy and psychology under Theodor Lipps, who was famous for interdisciplinary research in both fields.[33] While Reinach's heart clearly lay in philosophy and its intersection with empirical psychology, he also studied law and jurisprudence; indeed, he earned a PhD in philosophy in 1904 with a dissertation on the concept of causality in criminal law.[34] During his years in Munich, Reinach fell in with a broad group of other students of Lipps, who would largely form his intellectual network for the rest of his life, many of whom were or would go on to be important philosophers in their own right – Johannes Daubert, Dietrich von Hildebrand, Max Scheler, Moritz Geiger, Theodor Conrad, Alexander Pfänder, and more.[35]

While Reinach was beginning his intellectual journey in Munich, Edmund Husserl, already established, was working in Göttingen, on, among other things, the foundations of logic, and the relationship between logic and psychology.[36] In his 1901 work *Logical Investigations*, Husserl argued against the view (much in vogue, and embraced by philosopher-psychologists like Lipps) that logic was reducible to psychology, and propounded a new method, which he called 'phenomenology', as an alternative.[37] Reinach's circle in Munich began reading Husserl in the early years of the twentieth century, and its members were particularly attracted by the emphasis in *Logical Investigations* on the metaphysical realism of logic, as contrasted with the views of their mentor, Lipps.[38] In 1905, Reinach and several of his friends from Munich began moving to Göttingen to work with Husserl directly – the so-called 'Munich invasion of Göttingen'.[39]

Evidently, however, in a familiar tale, Reinach's parents found disputes about the ontological status of logic rather frivolous (or at least unemployable), and insisted he return to his legal studies.[40] He did so in 1906, taking courses in Munich and Tübingen, most influentially from the legal theorist Ernst Beling, whose account of criminal law saw it as composed of 'delict-types', through which certain sets of facts were held to constitute specified legal forms – not unlike Reinach's own later views in civil law.[41] And though clearly he had little interest in practicing law, Reinach's

[32] Anna Reinach, sketch of a 'Lebenslauf', in the Bavarian State Library, Ana 379 D II1 (quoted in Schuhmann and Smith (n 1) 2.
[33] Schuhmann and Smith (n 1) 2.
[34] Adolf Reinach, 'On the Concept of Causality in the Criminal Law' (tr. Berit Brogaard) (2009) 1 Libertarian Papers 1; Schuhmann and Smith (n 1) 5.
[35] Alessandro Salice, 'The Phenomenology of the Munich and Göttingen Circles' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (online 2020).
[36] Stefania Centrone, *Logic and Philosophy of Mathematics in the Early Husserl* (Springer 2010).
[37] Edmund Husserl, *Logical Investigations, Vol. I* (JN Findlay tr, Routledge 2001).
[38] Salice (n 35); Schuhmann and Smith (n 1) 6.
[39] Salice (n 35).
[40] Crosby, 'A Brief Biography' (n 31) viii.
[41] Schuhmann and Smith (n 1) 7–8; Baltzer-Jaray (Chapter 4, this volume).

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legal studies were not without characteristic intellectual enthusiasm – he boasted to his friends that he had memorized large portions of the Imperial German Code of Civil Procedure[42] and commented favourably on the insight of many of his teachers.[43] In 1907, he sat for and passed the state law exams, before promptly returning to philosophy.[44]

In 1909, once more firmly working on philosophical issues, Reinach habilitated at Göttingen with Husserl's support, with a thesis on the nature of judgement, and began teaching as a *Privatdozent*.[45] His teaching – something he had done informally among his philosophical peers for a long time – was rather legendary;[46] 'the Göttingen students … of this period refer to Reinach, not to Husserl, as their real teacher in phenomenology;'[47] observing that he was 'brilliant in directing philosophical seminars'.[48]

During these years, Reinach worked closely with Husserl as an assistant, helping to revise and prepare the second edition of *Logical Investigations*, which was to be published in 1913, and helping to edit Husserl's new journal *Yearbook for Philosophy and Phenomenology Research*, which would become the preeminent publication of the phenomenological movement in the following decades.[49] In 1912, Reinach married Anna Stettenheimer, among the first women to obtain a PhD in physics from the University of Tübingen.[50]

At the same time, Reinach was hard at work on his own contributions. In 1913, in the first edition of the *Yearbook*, he published his masterwork, *The A Priori Foundations of the Civil Law*.[51] Connecting his legal training with his philosophical thinking, the monograph argues that, rather than inventions of positive law, foundational legal concepts like promise and property are metaphysically real, and knowledge about them is accessible *a priori*.[52] Specifically, these legal forms are *social acts*, which Reinach took to be an ontological kind not sufficiently recognized in philosophy.[53] Similar to John Austin's later theory of speech acts, this 'discovery' of social acts in the *Foundations* is what Reinach is best known for today.[54] But in the remainder of the work, Reinach seeks to illustrate the realism of legal concepts by

[42] Quoted in Schuhmann and Smith (n 1) 8.
[43] ibid.
[44] Crosby, 'A Brief Biography' (n 31) viii.
[45] Schuhmann and Smith (n 1) 12–13.
[46] Salice (n 35); Schuhmann and Smith (n 1) 14; Crosby, 'A Brief Biography' (n 31) ix.
[47] Herbert Spiegelbert, *The Phenomenological Movement* (3rd ed, Springer 1994) 191.
[48] Edmund Husserl, *Briefe an Roman Ingarden* (Nijjoff 1968) 114.
[49] Schuhmann and Smith (n 1) 12–16.
[50] Kimberly Baltzer-Jaray, 'Happy 104th Wedding Anniversary, Adolf & Anna!', https://reinach.ophen.org/2016/09/15/happy-104th-wedding-anniversary-adolf-anna/.
[51] Reinach, 'Foundations' (n 7).
[52] ibid 4.
[53] ibid 18–28.
[54] Sources cited in note 2, above.

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reasoning to synthetic *a priori* judgements about them – that, say, a promise need not be accepted; a claim dissolves once waived.[55]

In the same edition of the *Yearbook* in which the *Foundations* appeared, Husserl also published his next great work, *Ideas*, advocating for phenomenology grounded not in metaphysical realism but transcendental idealism.[56] The contiguity of this work with Husserl's realism about logic in *Logical Investigations* has long been controversial, and Reinach and his fellow travelers in metaphysical realism took it as a substantial departure – 'the *Ideas* … provided young phenomenologists with an opportunity to renew their commitment to a robust form of metaphysical realism, which was perceived as incompatible with Husserl's transcendental idealism.'[57] Indeed, while it may have been 'something of an exaggeration'[58] to claim that after *Ideas* 'Reinach and, following him, the others broke away from the new developments',[59] an important intellectual rift had opened among self-identified 'phenomenologists,' and Reinach and Husserl were beginning to disagree about the basic foundations of philosophy.[60]

Any further intellectual divergence (or reconciliation) between Reinach and Husserl was, however, not to be. In August 1914, Europe descended into general war.[61] The notorious, now-mystifying war fever that swept Europe that fateful month did not pass Reinach by – he volunteered immediately and was in France by September, alongside his younger brother Heinrich, also a lawyer, who would later be imprisoned on *Kristallnacht* and escape to Brazil.[62] While at the front, Reinach continued thinking about philosophy – corresponding with his friends on philosophical topics and announcing lecture courses he would never give.[63] In 1916, Reinach converted to Christianity and, while on leave, he and Anna were baptized into the Protestant Church.[64] His final writings were sketches on the phenomenology of religion, written from the battlefield.[65] Adolf Reinach died in the service of the German Empire on 16 November 1917, at the age of thirty-three.[66]

Back in Germany, Edmund Husserl eulogized Reinach in *Kant Studies* – 'German philosophy has suffered a heavy loss as a result of Adolf Reinach's early

[55] Reinach, 'Foundations' (n 7).
[56] Schuhmann and Smith (n 1) 20; Edmund Husserl, *Ideas: General Introduction to Pure Phenomenology* (originally published 1913) (Routledge 2012).
[57] Salice (n 35).
[58] Schuhmann and Smith (n 1) 21.
[59] D Cairns, *Conversations with Husserl and Fink* (Nijhoff 1976) 10.
[60] Salice (n 35); Crosby, 'A Brief Biography' (n 31) ix; Rodney KB Parker (ed), *The Idealism-Realism Debate Among Edmund Husserl's Early Followers and Critics* (Springer 2021).
[61] Barbara W Tuchman, *The Guns of August: The Outbreak of World War I* (Penguin 1994).
[62] Schuhmann and Smith (n 1) 23; 2.
[63] ibid 24.
[64] ibid 24; Crosby, 'A Brief Biography' (n 31) ix–x.
[65] Schuhmann and Smith (n 1) 24; Crosby, 'A Brief Biography' (n 31) ix–x.
[66] Schuhmann and Smith (n 1) 24.

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death.'[67] Reinach had left his unpublished papers with Anna, with instructions to destroy them in the event of his death.[68] Several previously unpublished fragments nevertheless appeared in the *Collected Writings* of Adolf Reinach, published in 1921 and edited and arranged by Edith Stein and other students, with an introduction by Hedwig Conrad-Martius;[69] other writings were finally destroyed when Anna Reinach fled Germany in 1942, in the face of Nazi persecution.[70]

I.2 REINACH AND HIS METHOD

To modern philosophical eyes, Reinach is a difficult philosopher to place. On the one hand, he writes like an analytical philosopher – he is engaged in an exercise that looks a lot like conceptual analysis, tosses variables around, and routinely invokes the philosophy of mathematics. On the other, he called his method 'phenomenology' and was a prime assistant to ur-Continental Edmund Husserl. Was Reinach an 'analytical' philosopher or a 'Continental' one? The answer, perhaps, is both, and neither.

Indeed, Reinach's life, and his work, sits right at the point of departure of these schools. The Husserl of *Logical Investigations* was influenced by Gottlob Frege, often taken to be the founder of analytical philosophy, and was preoccupied with the foundations of mathematics and logic, just like Russell, Carnap, and the early Wittgenstein.[71] It was this Husserl that Reinach, and the other 'Munich Realists' were drawn to and worked with.[72] This began to change after *Ideas*, as Husserl took a turn into transcendental idealism, and Reinach and his friends doubled down in their realist commitments.[73] Before the War, Reinach remained Husserl's closest assistant.[74] After, Husserl obviously needed a new one.[75] He settled on a former seminary student named Martin Heidegger;[76] and the rest, as they say, is history.

But before you jump to the conclusion that Reinach is *just* some sort of crypto-analytic, that isn't quite right either. It was very important to him that his method was 'phenomenological', and he insisted on claims such as that '[i]n immersing ourselves in the essence of [legal] entities, we spiritually see what holds for them'.[77]

[67] Edmund Husserl, 'Obituary notice (entire)' in John Crosby (ed), *The Apriori Foundations of the Civil Law: Along with the Lecture 'Concerning Phenomenology'* (Ontos Verlag 2012) xi, originally published in (1919) 13 Kant-Studien 147.
[68] Schuhmann and Smith (n 1) 25.
[69] Adolf Reinach, *Gesammelte Schriften* (Niemeyer 1921); Schuhmann and Smith (n 1) 25.
[70] Schuhmann and Smith (n 1) 25.
[71] Salice (n 35).
[72] ibid.
[73] ibid.
[74] Schuhmannn and Smith (n 1) 21.
[75] Salice (n 35).
[76] Edmund Husserl, *Edmund Husserl Briefwechsel, Vol. 2 Die Münchener Phänomenologen* (Elisabeth Schuhmann and Karl Schuhmann, eds, Kluwer 1994)
[77] Reinach (n 7).

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Indeed, it might be best to say that the moment of 'Realist Phenomenology' Reinach occupied with his friends from Munich was its own bounded moment in philosophy – then eclipsed after twenty years of turmoil by the linguistic turn in English and existentialism on the Continent. The survivors of the moment – Roman Ingarden, Max Scheler, Hedwig Conrad-Martius, Dietrich von Hildebrand, Edith Stein – carried on the legacy of Realist Phenomenology in more religious philosophy.[78]

The chapters in the first part of the book address questions raised by Reinach's philosophical method, his relationship to other philosophical schools, and the implications of his philosophical position for his jurisprudence. In 'Promising, Owning, Enacting: Adolf Reinach's Phenomenology of Legal Speech Acts', Marietta Auer draws out the nature of Reinach's phenomenological theory of private law by examining it in light of both the German civil law tradition and mid-century language philosophy. As noted earlier, Reinach was trained in the law, and the *Foundations* reflects a deep knowledge of the German Civil Code. This knowledge of German law shapes some of Reinach's analysis but, at other times, offers a foil for his views. Those views rest on a theory of social speech acts – legal relations arise when actors engage in various social speech acts. Reinach concentrates in particular on promising and owning. Auer shows how deeply linguistic Reinach's approach is and draws out its etymological background. Promising involves speaking (*versprechen*), and owning involves hearing and obeying (*gehören*). Even enactment is a social speech act (*bestimmen*) with etymological linguistic overtones.

This confluence of tools and goals in Reinach's phenomenology of private law allows him to avoid some of the pitfalls of established schools of thought, Auer argues. His approach is not wholly positivist, and nor is it moralist (natural law) or nominalist (as in Legal Realism and its relatives). Reinach can, from this perspective, be interpreted as eschewing metaphysics where it is not necessary. Promisors are obligated to perform because they have promised, rather than because of positive law, promisee reliance, good consequences from promise keeping, and the like. Reinach thus solves notorious problems – such as justifying the bindingness of promises and the nature of ownership as more than a bundle of rights – by stopping philosophical analysis when it reaches the '*a priori*' bedrock in the law. In this way, Reinach does not overclaim about what ought to be from what is, and thereby avoids the common pitfalls of 'ontologism'.

In 'Darwin's Reinach', James Toomey argues that Reinach's approach to basic legal concepts can be embraced on the basis of evolutionary psychology rather than Reinach's own strong metaphysical views. Reinach thought that basic legal

[78] As discussed above, Reinach, too, converted to Christianity during the First World War. Crosby, 'A Brief Biography' (n 31) x. It is perhaps fair to critique Realist Phenomenology as demanding a faith in the abstract and immaterial closely compatible with religion and mysticism. On the other hand, at least in Reinach's case, it is hard to disentangle the influence of his combat experiences from his own turn to religion. Husserl, 'Obituary' (n 67) xiv; Schuhmann and Smith (n 1) 24.

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concepts existed outside the law, that positive law could deviate from them, and that both are distinct from morality. This combination of positions is very unusual and was a path not much trodden in the twentieth century. However, later developments in evolutionary psychology bear some resemblance to Reinach's position – legal concepts are anchored in reality, because adaptive fitness is necessarily constrained by external reality of some kind. Evolution and an evolved modular mind produce concepts very much like those explored by Reinach. Toomey points out that there is some irony in this, in that Reinach wrote at a time when controversy raged over whether concepts and reasoning were psychological or more firmly grounded ontologically. With Edmund Husserl and Gottlob Frege, Reinach took the ontological side and was at great pains to distance himself from the 'psychologism' of his mentor Theodor Lipps. By contrast to the psychology of his day, modern evolutionary psychology is not as plastic and arbitrary and so is surprisingly compatible with Reinach's *a priori*, without being a full-blown *a priori* in the metaphysical sense.

Although a strongly ontological and an evolutionary psychological take on concepts are in principle distinct, Toomey argues that for practical purposes they are very close, and closer than Reinach and his contemporaries thought. Reinach, Husserl, and Frege made arguments for ontological robustness of concepts and reasoning that were contested at the time. The domain most amenable to their approach was mathematics. Reinach's subject matter, the law, presents difficulties because law is inherently social – no people, no law. Reinach took his concepts to be timeless and equally applicable to any beings capable of engaging in social acts, but experience only offers people as such agents, and in this domain, Toomey argues, evolutionary psychology points in the same directions as Reinach's methodology. Thus, one can accept that Reinachian concepts exist as features of human psychology without taking them to exist as metaphysically distinct basic concepts as Reinach did.

Lorenz Kaehler, in 'Is There a Legal A Priori? On Necessary, Essential, and Non-positive Propositions in Reinach's Theory', interrogates Reinach's central thesis in the *Foundations* – that there indeed exist *a priori* legal propositions independent of all positive law. Kaehler maintains that, although Reinach has convincingly shown that there are *non-positive* propositions of law with truth value – that is, legal propositions that are true not solely by reference to positive law – he has not demonstrated the more ambitious claim that these propositions are in fact epistemically *a priori*. Indeed, as Kaehler points out, there are a variety of ways in which legal propositions could be non-positive but not *a priori* – they might be presupposed by positive law, perhaps grounded in minimal morality, or at least partially justifiable with reference to experience.

From Kaehler's perspective, Reinach's arguments for insisting that the non-positive propositions he is discussing, indeed all plausible arguments for insisting that non-positive propositions are *a priori*, are unavailing. Drawing on more recent

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work in epistemology and metaphysics, Kaehler suggests that there are many necessary, essential, and intuitive propositions that depend on experience – and to the extent those are the only arguments in favor of the *a priori* status of Reinach's legal propositions (and they seem to be) they do not get us to that conclusion. And yet, according to Kaehler, the fact that Reinach has not proven the central thesis of the *Foundations* does not mean that his analysis is unimportant. Though Reinach *thought* he had discovered an *a priori* sphere of right, Kaehler grants he conducted important analysis of something like a *non-positive* sphere of right, a significant domain of legal propositions thus far inadequately theorized.

In 'Adolf Reinach, Negation, and Law,' Kimberly Baltzer-Jaray connects Reinach's legal philosophy and training to broader aspects of his ontology. Among contemporary ontologists, Reinach is known for the controversial view that 'negative states-of-affairs' – the rose's *not* being blue, for instance – have the same ontological status as positive ones – the rose's *being* red. This position was received with skepticism by many of Reinach's fellow travelers in phenomenological realism, including Johannes Daubert and Roman Ingarden, who insisted that the ontological status of positive states of affairs is always primary; negative ones are at best derivative, and, at worst, purely psychological or linguistic.

But Baltzer-Jaray argues that there might be something to Reinach's position, and that it was Reinach's legal studies – unique among his philosophical peers – that helped him see it. As Baltzer-Jaray points out, apparently negative states-of-affairs – the *absence* of due care, say – routinely play a role in constituting legal conclusions as much as positive ones do. Negative states of affairs, in other words, often appear *legally* on a par with positive states. This ubiquitous structure of legal reasoning, Baltzer-Jaray argues, helped Reinach consider the role of negation in ontology in a way that was unavailable to his contemporaries, and revealed to him an ontological significance in negative states of affairs that others did not appreciate. Moreover, Baltzer-Jaray suggests that Reinach's views on negative states-of-affairs might have implications for a range of contemporary social and ethical problems, and that linking his legal philosophy to his ontology can help make sense of him as a unified philosophical thinker.

I.3 REINACH AND PRIVATE LAW THEORY

If you're looking for contemporary legal theorists, who, like Reinach, claim to be outlining the *a priori* foundations of private law, you'll be looking a long time. But that hardly means that Reinach doesn't bear resemblance – in sharing certain concerns, conclusions, and methods – to many important threads in contemporary private law theory. To be sure, Reinach's careful parsing of the entailments of concepts like 'promise', 'enactment', and 'obligation' divorced (at least aspirationally) from any consideration of the positive law are about as far away from the nominalist view of legal concepts still fashionable in traditional Law and Economics

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and Critical Legal Studies. But the last two decades or so have seen a resurgence in private law theory outside of these schools.

This work has come from a variety of points of entry. Some of it draws on moral philosophy, and a turn towards something more like metaphysical and moral realism in analytical philosophy.[79] Other scholars think that legal concepts, regardless of their moral or ontological status, serve necessary functions – economic, psychological, semantic – in packaging information across domains.[80] And still others simply *do* doctrinal analysis, taking it seriously as a project.[81] Traveling under the heading of 'New Private Law', these disparate threads have argued that there is a place for the internal conceptual structure of traditional legal reasoning.[82]

Reinach's legal philosophy offers important points of connection with this intellectual movement, as well as significant contrasts. And the chapters in Part II engage with these sorts of connections – laying bare and critiquing Reinach's theories of legal philosophy or comparing and contrasting Reinach's positions with those of other theorists.

Andrew Gold and Henry Smith, in 'Legal Concepts as a Deep Structure of the Law: Reinach's A Priori in Action', argue that regardless of the ontological status of the legal concepts Reinach analyses, his methods and conclusions are clearly on to *something*, and on to something of value to both sides to various persistent dichotomies in private law theory. Taking Reinach's discussion of property, transfer, and representation as case studies, they reveal how Reinach's analysis captures general intuitions behind common forms in many positive legal systems, often more plausibly than alternative accounts. Gold and Smith analogize Reinach's *a priori* domain of right to the role that 'deep structure' plays in generative grammar theory – a consistent, robust structure presupposed by, and which indeed makes possible,

[79] Weinrib (n 11); Rebecca Stone, 'Private Liability Without Wrongdoing' (2023) 73 University of Toronto LJ 53; Scott Hershovitz, 'The End of Jurisprudence' (2015) 124 Yale LJ 882; Steven Schaus, 'A Simple Model of Torts and Moral Wrongs' (2022) 97 Notre Dame L Rev 1029; Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (2nd ed Oxford University Press 2015); Seana Valentine Shiffrin, 'The Divergence of Contract and Promise' (2007) 120 Harvard L Rev 708; John Gardner, 'What Is Tort Law For? Part I. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 50.

[80] Thomas W Merrill and Henry E Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 Yale LJ 1; John CP Goldberg and Benjamin C Zipursky, 'Torts as Wrongs' (2010) 88 Texas L Rev 917; Henry E Smith, 'Property as the Law of Things' (2012) 125 Harvard L Rev 1691; Shyamkrishna Balganesh and Gideon Parchomovsky, 'Structure and Value in the Common Law' (2015) 163 University of Pennsylvania L Rev 1241; Jeremy Waldron, '"Transcendental Nonsense" and System in the Law' (2000) 100 Columbia L Rev 16; Felipe Jiménez, 'A Formalist Theory of Contract Law Adjudication' (2021) 2020 Utah L Rev 1121.

[81] Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 Journal of Equity 1; Danielle D'Onfro, 'Contract-Wrapped Property' (2024) 137 Harvard L Rev 1061; Lawrence M Solan, 'Contract as Agreement' (2007) 83 Notre Dame L Rev 353.

[82] Andrew S Gold, John CP Goldberg, Daniel B Kelly, Emily Sherwin, and Henry E Smith (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press 2020).

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variation in surface structure. And just as with deep structure in linguistics, Reinach's *a priori* might be consistent with a range of theories of its ontological grounding – perhaps it is onto something metaphysically real, but it could just be psychologically universal, or conventional in response to consistent functional needs, all three, or other things.

Seeing Reinach's theory in this light, Gold and Smith argue, has several benefits, and helps cut through contemporary polarities in private law theory. Reinach's account is 'internal' in the sense that it takes seriously the law's conceptual vocabulary, yet 'external' insofar as it is agnostic to the positive law; it is 'holist' in refusing to theorize primitives away, but 'reductionist' in revealing how complex positive legal mechanisms can be built from a deeper, smaller array of primitives. Moreover, reckoning with the deep structure of law can have benefits in purely functional terms, taking stock of the kinds of legal propositions people will find intuitive, and those that require greater cognitive load to enshrine and enforce. Reinach, Gold and Smith take it, is thus doing – or at least compatible with – New Private Law.

In 'Private Law beyond the Law', Sandy Steel tackles one of the most puzzling aspects of Reinach's legal theory – the relationship between his analysis of *a priori* legal concepts and the inevitable normativity of the positive law, in the demands it makes of us and the reasons to which it is answerable. Steel does so in two ways. First, he observes that, while many contemporary private law theorists do not *say* they are seeking something as mysterious as the '*a priori* foundations of the civil law', it often looks as though that is what they are doing. Where most contemporary such theorists depart from Reinach, however, is in that they appear to be studying the *a priori moral* foundations of private law, as, say, contemporary neo-Kantians. In contrast, Reinach's approach to descriptive analysis carries unique benefits in clarity, but unique risks of conflating that which *a priori is* with that which the positive law *ought* to do, a risk of which Reinach himself was acutely aware.

Second, Steel synthesizes Reinach's scattered, and perhaps not altogether clear, remarks about normativity in the *Foundations*. At once, Reinach maintains that promises generate, *a priori*, obligations, but that these obligations are not *moral* obligations; that positive law has the capacity to create genuine oughts; and yet at the same time that positive law might be answerable to extrinsic moral considerations. Steel finds provocative points of comparison in contemporary private law theory and case law, while at the same time questioning whether Reinach in fact held a coherent, thorough theory about the relationship between his *a priori*, normativity, and the positive law. In short, Steel argues that Reinach's unique phenomenology of legal concepts at once clarifies and elides the normativity of positive law.

Paul Miller, in 'Reinach on Personality and Representation', juxtaposes what he takes to be one of Reinach's most insightful contributions – his analysis of representation – with an admirable failure – his incomplete analysis of legal personhood. Unlike many contemporary private law theorists and legal philosophers, Miller observes, Reinach was well aware that his theory demanded an account of legal

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personhood, and throughout the *Foundations* he gestures obliquely to the conditions and prerequisites of personhood – an admirable aspiration. At the same time, Miller finds Reinach's discussion incomplete, alluding to rather than substantiating a thorough theory of personhood. And Reinach's failure to connect his theory of legal concepts to a theory of persons who use them and for whom they are used, Miller holds, renders Reinach's claims to have discovered universal truths accessible to all intelligence implausible.

Where Reinach's discussion of personhood was incomplete, Miller describes his analysis of representation as something of a triumph – an account second only to Hobbes' and distinguished by its own genuine insights. Some of these innovations include Reinach's distinction between authentic and inauthentic representation, drawing on his view of social acts as having authentic and inauthentic forms, and his account of passive representation. At the same time, Miller argues that Reinach's theory of representation is ultimately limited by his failure to connect it to a general account of legal personhood. As elsewhere, Reinach acknowledges that representation is intimately tied up with legal personality. But without a theory of legal personality, his theory of representation must necessarily be limited.

Olivier Massin, in 'The Ontology of Liberties: Reconciling Reinach and Hohfeld' situates Reinach alongside his more influential contemporary – Wesley Hohfeld. Working independently through their brief, contemporaneous lives in Germany and the United States, respectively, Massin points out many similarities in the legal ontologies of Reinach and Hohfeld – both sought to elucidate the obscure, essential conceptual substructure of legal reasoning, clarifying legal discourse at its atomistic base level. And in so doing, Reinach and Hohfeld settle on many of the same essential distinctions – between claim rights and liberty rights, between possession and ownership, between legal powers and legal rights, and more.

At the same time, Reinach and Hohfeld disagree significantly on the nature of legal liberties. Hohfeld claims such rights correspond to correlative 'no rights' held by others. Reinach rejects this – liberty rights, he claims, are *absolute* rights, which essentially lack correlatives of any kind. Massin argues that both theorists are on to something. Reinach is right, he suggests, insofar as *some* liberties are absolute and uncorrelative. But he is wrong that all are – and as Hohfeld argued, Massin contends that *some* liberties do indeed have no-right correlatives. Taking Reinach and Hohfeld together, in other words, helps illuminate a thorough ontology of liberty rights that accommodates both relative and absolute liberties.

I.4 REINACH AND LEGAL CONCEPTS

Reinach's most famous philosophical position is his discovery of social acts. His most controversial is metaphysical realism about legal concepts. But neither of these positions occupies most of Reinach's time and attention in the *Foundations*. Most

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of the *Foundations* is dedicated to careful analysis of specific legal concepts – promise, claim, obligation, property, lien, enactment, and more. To take Reinach seriously, then, is not merely to interrogate his phenomenological realism, nor to situate him among contemporary currents in legal theory. It is, at least in part, to *do* what he did – to theorize about the law and its concepts along the lines that he does, inspired by some aspect of his analysis, whether what he has to say about particular legally significant concepts, or guided by his commitment to concepts' realism and primitive atomism.

The chapters in Part III do just that – tackling a particular legal concept either directly on Reinach's terms, or in a method broadly inspired by his. Stephan Kirste, in 'Adolf Reinach and Gerhart Husserl on the Foundations of Legal Phenomenology and the Temporality of Law', offers a thorough examination of the legal concept of time in Reinach's work as compared to that of Gerhart Husserl, son of Edmund and a later phenomenologist. In so doing, Kirste reveals important similarities and disagreements between Reinach's Pre-War Realist Phenomenology, and Gerhart Husserl's transcendental idealist perspective drawing on the later work of his father and of Heidegger. As Kirste points out, Reinach believed that legal concepts like promises, in their general form, are timeless and *a priori*, but that particular instances of promises, and the claims and obligations they give rise to, are inherently temporal and in a peculiar way under-appreciated in philosophy – they are entities that come into being with the promise, and disappear from the world with its fulfilment or waiver.

According to Kirste, this suggests that Reinach understood that the law to some extent relies on its own internal temporal structure, in principle distinct from the general flow of chronological time – a promise creates its own 'extended present' within which it could be accepted. Working within the idealist phenomenology of later decades, untethered from a timeless *a priori* realm, Gerhart Husserl took a similar notion further, suggesting that law, a work of will of the population, expresses its own abstract temporal consciousness in the decisions of particular judges. But Kirste argues that neither Reinach nor Gerhart Husserl fully appreciated the extent to which law indeed regulates its own past, present, and future, and thus creates its own temporality, each offering a less-than-complete theory of the relationship between law and time.

In 'How to Make Gifts with Words', Emma Tieffenbach employs Reinach's theory of social speech acts and his analysis of promise to evaluate theories of gifts. Analytic philosophers disagree over basic questions about the nature of gifts. Does the recipient of a gift need to know about a gift for it to occur? Does the recipient have to accept the gift? Does a physical transfer have to occur? Some other kind of transfer? Reinach never treated gift in any detail, but his general theory and its application to promises suggests that a declaration that the gifter is (thereby) transferring ownership is required. No act on the part of the recipient is needed, although a recipient can by an affirmative act prevent the gift from being completed.

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A gift need not be taken up but can be refused. Key to this analysis is the idea that the transfer is of ownership, not of the thing itself.

This 'Ownership View of Gift' that Tieffenbach endorses carries a number of advantages. Although in common parlance gifts are treated as transfers of things, a close look at gifts in Reinachian fashion reveals that the structure of gifts is based on transfer of ownership. Gifts are not bilateral even though they can be blocked by the recipient. Moreover, linguistic usage and borderline scenarios reveal that uptake is not required and that it is ownership that is transferred. Moreover, Tieffenbach suggests that her view helps explain the surprisingly wide variety of speech acts that can result in such a transfer of ownership. These include the familiar speech acts involving transfer of ownership directly but also embrace the granting of a right to revoke a promise to pay for a thing and the waiver of a right to an amount of money owed for a thing. That such specific insights into gifts flow from a close look into the metaphysics of the social speech acts involved in gifting is quite Reinachian in spirit.

In 'So Close and Yet So Far: Reinach and Gilbert on Promises', Alessandro Salice and Olivier Massin compare Reinach's theory of promises to the more recent theory of Margaret Gilbert, noting striking similarities, but ultimately endorsing Reinach's theory as stronger where they come apart. Like Reinach, and unlike most of today's theorists, Gilbert maintains that promises, even immoral ones, inevitably give rise to obligations, that these obligations are non-moral and relational, and that theories of promissory obligation that seek to ground the binding character of promise in expectation, trust, or other functional concerns are off on the wrong foot. Unlike Reinach, however, who insists that promise is an *a priori* primitive that by its nature generates obligations, disclaiming the need for further grounding, Gilbert situates promises as a form of joint commitment – the promisor and promisee jointly committing to endorse as a body the promisor's plan of action.

For a variety of reasons, Salice and Massin argue that Gilbert's account is not a plausible theory of our ordinary concept of promise. It suggests, for example, that a promise is something a promisor and promisee do together, and for which a promisee bears some moral responsibility, while we generally think of promises as an act of a promisor themselves, for which they bear sole responsibility. The failure of Gilbert's account in these ways, notwithstanding its admirable solicitude for taking ordinary social concepts seriously, Salice and Massin maintain, suggests that Reinach's view might be on to something – perhaps the concept of promise is simply a primitive that generates obligations by virtue of its very nature, such that accounts that seek further grounding for that fact are doomed to failure.

Finally, Crescente Molina, in 'The Conceptual Foundations of Contract Formation', offers a novel account of contract formation in a thoroughly Reinachian spirit. Molina starts from the premise – the 'Necessity of Agreement Axiom' – that contracts presuppose the mutual assent of at least two people to some sort of agreement. Taking this widely accepted intuition about the essential nature of contract, Molina argues, expands our account of the possibilities of contract

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formation. While the traditionally taught ritual of 'offer' and 'acceptance' is surely *one* way parties can reach the required agreement, this traditional framing obscures another – 'contractual subscription', or agreement to a pre-existing set of legal entailments in legislation, custom, or elsewhere.

Assuming the Necessity of Agreement Axiom, Molina considers the kinds of social acts that can or must constitute contracts. He suggests, contrary to the longstanding assumption of the common law world, that the social act of promise is the wrong place to start. Bare promises can *unilaterally* generate obligations. If a promise is to create a bilateral agreement, as demanded by the Necessity of Agreement Axiom, it must be in a particular form – a *promissory offer* that by its terms only becomes binding on acceptance. It is not the social act of promising *simpliciter*, then, but only a particular species, that could give rise to contract. But Molina, indeed, thinks the Necessity of Agreement Axiom pushes us even further – to recognizing that contracts could be formed without any social act at all. In some cases of contractual subscription, Molina holds, a contract comes into being with only *internal* assent; assent that fulfills the Necessity of Agreement Axiom, but is not a *social* act, in Reinachian terms, at all.

BIBLIOGRAPHY

Auer M (Chapter 1, this volume)

Austin JL, *How to Do Things with Words* (JO Urmson and Marina Sbisà, eds, 2d edn Harvard University Press 1975)

Balganesh S and G Parchomovsky, 'Structure and Value in the Common Law' (2015) 163 University of Pennsylvania L Rev 1241

Baltzer-Jaray K (Chapter 4, this volume)

'Bogged Down in Ontologism and Realism. Reinach's Phenomenological Realist Response to Husserl', in RKB Parker (ed), *The Idealism-Realism Debate among Edmund Husserl's Early Followers and Critics* (Springer 2021)

'Happy 104th Wedding Anniversary, Adolf & Anna!', https://reinach.ophen.org/2016/09/15/happy-104th-wedding-anniversary-adolf-anna/

'Adolf Reinach Is Not a Platonist' (2009) 13 Symposium: Canadian J Continental Philosophy 100

Brewer S, 'On the Possibility of Necessity in Legal Argument: A Dilemma for Holmes and Dewey' (2000) 34 John Marshall L Rev 9

Cairns D, *Conversations with Husserl and Fink* (Nijhoff 1976)

Calabresi G and AD Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard L Rev 1089

Centrone S, *Logic and Philosophy of Mathematics in the Early Husserl* (Springer 2010)

Cohen FS, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Columbia L Rev 809

Coleman JL, 'The Practice of Corrective Justice' (1995) 37 Arizona L Rev 15

'Truth and Objectivity in Law' (1995) 1 Legal Theory 33

Crosby JF, 'A Brief Biography of Adolf Reinach', in J Crosby (ed), *The Apriori Foundations of the Civil Law: Along with the Lecture 'Concerning Phenomenology'* (Ontos Verlag 2012)

'Adolf Reinach's Discovery of the Social Acts' (1983) 3 Aletheia 143

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 14 Nov 2026 at 21:17:16, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009446013.001

D'Onfro D, 'Contract-Wrapped Property' (2024) 137 Harvard L Rev 1061
Duxbury N, 'The Legal Philosophy of Adolf Reinach' (1991) 77 Archives for Philosophy of Law and Social Philosophy 314
Dworkin R, *Law's Empire* (Harvard University Press 1986)
Fried C, *Contract as Promise: A Theory of Contractual Obligation* (2nd ed Oxford University Press 2015)
Gardner J, *From Personal Life to Private Law* (Oxford University Press 2018)
'What Is Tort Law For? Part I. The Place of Corrective Justice' (2011) 30 Law and Philosophy 1
Gold AS, JCP Goldberg, DB Kelly, E Sherwin and HE Smith (eds), *The Oxford Handbook of the New Private Law* (Oxford University Press 2020)
Gold AS and HE Smith (Chapter 5, this volume)
Goldberg JCP and BC Zipursky, 'Torts as Wrongs' (2010) 88 Texas L Rev 917
Hart HLA, *The Concept of Law* (3rd ed Oxford University Press 2012)
Hershovitz S, 'The End of Jurisprudence' (2015) 124 Yale LJ 882
Husserl E, 'Obituary notice (entire)', in J Crosby (ed), *The Apriori Foundations of the Civil Law: Along with the Lecture 'Concerning Phenomenology'* (Ontos Verlag 2012) xi, originally published in (1919) 13 Kant-Studien 147
Ideas: General Introduction to Pure Phenomenology (originally published 1913) (Routledge 2012)
Logical Investigations, Vol. I (tr. JN Findlay) (Routledge 2001)
Edmund Husserl Briefwechsel, Vol. 2 Die Münchener Phänomenologen (Elisabeth Schuhmann and Karl Schuhmann, eds, Kluwer 1994)
Briefe an Roman Ingarden (Nijhoff 1968)
von Jhering R, 'In the Heaven for Legal Concepts: A Fantasy' (tr. Charlotte L Levy) (1985) 58 Temple L Q 799
Jiménez F, 'A Formalist Theory of Contract Law Adjudication' (2021) 2020 Utah L Rev 1121
Kaehler L (Chapter 3, this volume)
Kennedy D, 'Form and Substance in Private Law Adjudication' (1976) 89 Harvard L Rev 168
Llewellyn KN, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co. 1960)
Loidolt S, *Einführung in die Rechtsphänomenologie* (Mohr Siebeck 2010)
Lüttenberg DJ, 'Über das Sein des Sollens – Die rechtlichen Gebilde in der Rechtsphänomenologie Adolf Reinachs' (2020) 11 Zeitschrift für rechtswissenschaftliche Forschung 9
Massa M, 'Property and *Nuda Potestas* as Constitutions of Reinach's Philosophy of Law (2020) 90 Folia Iuridica 75
Massin O, 'The Metaphysics of Ownership: A Reinachian Account' (2017) 27 Axiomathes 577
McFarlane B and R Stevens, 'The Nature of Equitable Property' (2010) 4 Journal of Equity 1
Merrill TW and HE Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 Yale LJ 1
Miller PB (Chapter 7, this volume)
'The New Formalism in Private Law' (2021) 66 American Journal of Jurisprudence 175
Mitscherling J, T DiTommaso, and A Nayad, *The Author's Intention* (Lexington 2004)
Mulligan K (ed), *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Nijhoff 1987)
Parker RKB (ed), *The Idealism-Realism Debate among Edmund Husserl's Early Followers and Critics* (Springer 2021)
Paulsen SL, 'Demystyifying Reinach's Legal Theory', in K Mulligan (ed), *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Kluwer 1987)

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Peller G, 'The Metaphysics of American Law' (1985) 73 California L Rev 1151
Purnhagen K, 'Grundlagen der Rechtsphänomenologie – Eine kritische Darstellung der Rechtsphänomenologie von Adolf Reinach und Wilhelm Schapp zu den apriorischen Grundlagen des Privatrechts' (2009) 31 JURA – Juristische Ausbildung 661
Reinach A, *Gesammelte Schriften* (Niemayer 1951)
'The Apriori Foundations of the Civil Law' (tr. JF Crosby) (1983) 3 Aletheia 1–142, reprinted in A Reinach, *The Apriori Foundations of the Civil Law: Along with the lecture 'Concerning Phenomenology'* (JF Crosby ed, Ontos Verlag 2012), originally published as A Reinach, Die apriorischen Grundlagen des bürgerlichen Rechtes, 1(2) *Jahrbuch für Philosophie und phänomenologische Forschung* (Max Niemeyer 1913), 685–847
'On the Concept of Causality in the Criminal Law' (tr. B Brogaard) (2009) 1 Libertarian Papers 1
Ripstein A, 'Private Order and Public Justice: Kant and Rawls' (2006) 92 Virginia L Rev 1391
S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)
Salice A, 'The Phenomenology of the Munich and Göttingen Circles', in EN Zalta (ed), *Stanford Encyclopedia of Philosophy* (online 2020)
Schauer F, 'The Limited Domain of the Law' (2004) 90 Virginia L Rev 1909
Schaus S, 'A Simple Model of Torts and Moral Wrongs' (2022) 97 Notre Dame L Rev 1029
Schuhmann K and B Smith, 'Adolf Reinach: An Intellectual Biography', in K Mulligan (ed), *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Nijhoff 1987)
Seron D, 'Adolf Reinach's Philosophy of Logic', in B Leclercq, S Richard, and D Seron (eds), *Objects and Pseudo-Objects: Ontological Deserts and Jungles from Brentano to Carnap* (De Gruyter 2015)
Shiffrin SV, 'The Divergence of Contract and Promise' (2007) 120 Harvard L Rev 708
Singer JW, 'Legal Realism Now' (1988) 76 California Law Review 465
Smith B, 'Realistic Phenomenology', in L Embree (ed), *Encyclopedia of Phenomenology* (Springer 1997) 58
'Adolf Reinach: An Annotated Bibliography' in K Mulligan (ed), *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Nijhoff 1987)
'On the Cognition of States of Affairs', in K Mulligan (ed), *Speech Act and Sachverhalt: Reinach and the Foundations of Realist Phenomenology* (Nijhoff 1987)
Smith HE, 'On the Economy of Concepts in Property' (2012) 160 University of Pennsylvania L Rev 2097
'Property as the Law of Things' (2012) 125 Harvard L Rev 1691
Solan LM, 'Contract as Agreement,' (2007) 83 Notre Dame L Rev 353
Spiegelbert H, *The Phenomenological Movement* (3rd ed Springer 1994)
Steel S (Chapter 6, this volume)
Stone R, 'Private Liability Without Wrongdoing' (2023) 73 University of Toronto LJ 53
Toomey J (Chapter 2, this volume)
'Property's Boundaries' (2023) 109 Virginia L Rev 131
Tuchman BW, *The Guns of August: The Outbreak of World War I* (Penguin 1994)
Waldron J, '"Transcendental Nonsense" and System in the Law' (2000) 100 Columbia L Rev 16
Weinrib EJ, *The Idea of Private Law* (Harvard University Press 1995)
Wolenski J, 'Adolf Reinach, Negative States of Affairs and the Concept of Omission' (2020) 90 Folia Iuridica 5

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